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IN THE

Supreme Court of the United States

October Term, 1956

No. 350

JOSEPH M. CAIN, *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph M. Cain, respectfully presents this petition for review on writ of certiorari of the decision and judgment of the United States Court of Claims rendered June 5, 1956 in the Case of *Joseph M. Cain* v. *United States of America*, No. 50418. The opinion of the Court of Claims is reported at 135 Fed. Supp. 516 and is included herein as Appendix A, pp. 1a to 18a.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. 1255.

STATUTES

The pertinent provisions of the Internal Revenue Code of 1939 material to the questions herein presented are set forth herein as Appendix B, pp. 18a and 19a.

QUESTIONS PRESENTED

Your petitioner respectfully represents that the decision of the Court of Claims raises the following questions:

1. Is the petitioner, a co-partner of his son, Dr. Charles C. Cain, in the practice of dentistry under a written partnership agreement entered into in the fall of 1942, effective on the first day of January, 1943, taxable on any portion of his son's share of partnership income for the calendar year of 1944 since the son was serving in the Armed Forces of the United States from December 5, 1942 until October 30, 1944 when the son returned to the practice of dentistry under said partnership agreement?

2. Is it permissible for the Commissioner of Internal Revenue, under the provisions of the Internal Revenue Code of 1939, to divide a tax year and refuse to recognize a professional partnership for the early part of said year but recognize it for a later portion in spite of the fact that the written partnership agreement was entered into prior to the year 1943, became effective on January 1, 1943 and all services rendered to the partnership in the year 1944 by the absent member were rendered under said 1942 agreement?

SUMMARY STATEMENT

The following statement is based upon the Findings of Fact made by the Court of Claims, appearing as part of Appendix A, pp. 1a to 18a. The petitioner, Dr. Joseph M. Cain, had been engaged in the practice of dentistry in the City of Canton, Ohio for many years as a partner of his father, Dr. Henry O. Cain, such partnership having been formed when petitioner graduated from college (Finding #1, p. 9a). The petitioner promised his son, Charles C. Cain, a full partnership upon the son's graduation in order to induce his son to enter dental school (Finding #2, p. 10a). Dr. Charles C. Cain was graduated from dental college in June, 1942, admitted to practice in the State of Ohio on August 5, 1942 and entered into a written partnership agreement with his father, the petitioner, in the fall of 1942, to become effective January 1, 1943 (Findings #3, 5, pp. 10a and 11a). By agreement between the petitioner and his son, the son worked as a salaried employee for his father from August until inducted into service in December, 1942 (Finding #4, p. 10a).

While in dental college, the son received a Navy commission as a probationary ensign and was commissioned a lieutenant (j.g.) in the Navy on October 30, 1942. He was called into service and left Canton, Ohio for active duty on December 5, 1942 (Finding #3, p. 10a). The son was in active service and away from Canton with the exception of two or three leaves of short duration, until October 30, 1944, but did perform services for the partnership on the occasions of his leaves during the period between December 5, 1942 and October 30, 1944 (Finding #7, p. 13a).

Partnership returns were filed by the partnership for the years 1943 and 1944 and Dr. Charles C. Cain

reported his share of partnership income for each of said years upon his own individual income tax returns and paid the taxes due thereon. Petitioner reported on his income tax returns for said years only his share of the partnership income and paid the taxes due thereon (Findings #9, 10, pp. 13a and 14a).

Upon examination of petitioner's returns for said years by the Commissioner of Internal Revenue the entire partnership income was held to be taxable to the petitioner on the basis that no bona fide partnership recognizable for income tax purposes, existed between petitioner and his son in the years 1943 and 1944 (Finding #11, p. 14a).

Deficiencies were thereupon assessed against the petitioner in the amounts of $25,303.20 for 1943 and $33,696.14 for 1944. Petitioner paid such deficiencies with the accrued interest, filed claims for refund and when said claims were either rejected or not acted upon, filed his action in the Court of Claims for recovery of the amounts of deficiencies and interest so paid by him (Findings #13, 14, 17, 18, pp. 15a and 16a).

By the decision of the Court of Claims, petitioner was held to be taxable for all partnership income for the year 1943 and for that part of the partnership income which had been earned prior to October 30, 1944 when his son, Dr. Charles C. Cain returned from military service. The Court of Claims held that on and after October 30, 1944, the partnership income should be taxed equally to petitioner and Dr. Charles C. Cain. By its order entered June 5, 1956, held petitioner was entitled to a refund of $2555.74 representing the tax and interest illegally collected from the petitioner on his son's share of income from the part-

nership from and after October 30, 1944. (Transcript p. 41).

The partnership, the petitioner and his son all filed their income tax returns and kept their books of account on a calendar year basis (Findings #8, 9, 10, pp. 13a and 14a).

PETITIONER'S CONTENTION

It is the contention of the petitioner, Joseph M. Cain, that the absence of a partner while serving in the Armed Forces of the United States is not a proper basis for splitting the tax year of the partnership so as to hold one partner wholly taxable for the partnership income during a part of the year while recognizing the partnership for the remainder of such tax year.

Or, to state the contention in another way, if vital services are rendered to a partnership in such manner that the partnership is recognized for any part of a calendar year, then the absence of a partner because of military service in the Armed Forces of the United States, cannot be used as the basis for splitting the taxable income of such absent partner irrespective of whether such services were rendered at the beginning, during the middle, or near the end of such calendar year.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Claims is contrary to law, there being no statutory basis for dividing or splitting the calendar year for income tax purposes.

2. The decision below deprives petitioner of his constitutional right of equal protection of the law

under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The failure of petitioner's son, Dr. Charles C. Cain, to engage actively in the conduct of the partnership business during the year 1944 was caused by the same agency, to-wit: the respondent, which now seeks to penalize the petitioner because of the son's absence in military service.

4. The Findings of Fact made by the Court of Claims do not support that Court's conclusions of law and its judgment and such conclusions and judgment are in conflict with the principles laid down in *Commissioner* v. *Culbertson*, 337 U.S. 733.

ARGUMENT

There are many decided cases which have recognized that the enforced absence of a partner in the armed forces during World War II did not destroy the partnership relation nor cause such absentee partner's share of partnership income to be taxable to one or more of the remaining partners.

For example, in *Isaac Blumberg*, 11 T.C. 663 (Acq. 1949-1 C.B.-p.1) on facts almost identical to those of the present cause, it was held that the absence of a son in the armed forces from December, 1942 until November, 1945 did not affect the partnership relationship or the son's taxability on his share of partnership income for the year 1943. In that case the partnership agreement was signed in August, 1942 to become effective January 1, 1943. The son left for military service in December, 1942 and consequently never rendered any service to the partnership. As the reported facts show, he remained in this country only

4 or 5 months after induction and then went overseas where he remained until November, 1945. We quote the head note in the *Blamberg* case as follows:

> "Under the facts, held, that during the taxable year 1943 petitioner was, by virtue of a valid written partnership agreement entered into in August 1942, a partner with his son in the department store business in Portsmouth, Virginia, and three-fourths of the net profits of the business belonged to petitioner and were taxable to him and one-fourth of the net profits belonged to petitioner's son and was taxable to him. The Commissioner's action in adding the son's one-fourth of the net profits to petitioner's net income was error and is reversed."

On page 671 of the Opinion, Judge Black makes the following statement:

> "* * * Clearly, if George had remained on with the business in 1943 and had continued to render the same kind of services that he was rendering the business in 1942, he would have been recognized as a partner under the rationale of the Lusthaus and Tower cases. We do not understand the respondent to contend otherwise. His contention that George should not be recognized as a partner in 1943 is based on the fact that all of that year he was in the military service and did not and could not render any important and vital services to the business. That George ceased to be a partner on that account seems to us to be an untenable doctrine. Death, of course, terminates a partnership, but it would be a strange doctrine to say that one did not become a partner because he was inducted into the military service of his country and was thereby unable to personally serve the partnership. It seems to us that the Government should not be heard to say: 'I will not recognize you as a partner even though you, in good faith,

> entered into it. I took you into the Army to fight a war and you did not perform services for the partnership as you had agreed to do.' "

In *Crossley* v. *Campbell*, 184 Fed. (2d) 639, involving the year 1943, a father-son partnership agreement was executed in June, 1942 while the son was in college. He completed his college studies about March 15, 1943 and worked for the partnership until May, 1943 when he was called into the Navy and remained in Service until June, 1946.

The second paragraph of the syllabus of this case holds:

> "Evidence sustains finding that partnership entered into by father with his son to operate electronic laboratories was real, bona fide partnership which should be recognized as valid for federal income tax purposes during the year 1943, notwithstanding son worked for firm only approximately two weeks in 1942 and two months in 1943."

Thus it appears from the foregoing citations that the family partnership was recognized for the entire tax and calendar year under circumstances:

(a) Where no service at all was rendered as a partner prior to or during the tax year in question because of absence in military service; and

(b) Where services were rendered as a partner during two months between March and May, but the first months of the year had been spent in college and the remaining months of the year in military service.

The petitioner contends that to recognize partnerships under those circumstances, but to deny the recognition of the partnership between petitioner and his son for the first ten (10) months of the year 1944, is

neither supported by logic nor law, and if allowed to stand deprives petitioner of the equal protection of law required by Section 1 of the Fourteenth Amendment to the Constitution.

It has often been stated by the courts that the unit of time, for income tax purposes, is either the calendar or a fiscal year and that neither the taxpayer nor the Government can throw income of one year into a prior or subsequent year for tax purposes. See *Commissioner* v. *Frame*, 195 Fed. (2d) 166 and *Commissioner* v. *Dwyer*, 203 Fed. (2d) 522. While these cases, and many others to the same effect, involve changes of accounting or reporting bases by taxpayers, the principle is identical.

The present case is not one where a partnership was newly formed on October 30, 1954. It was formed in 1942, to become effective January 1, 1943. It had been formed pursuant to a commitment made by the petitioner to his son some years before in order to induce the son to enter dental college.

The pertinent provisions of the Internal Revenue Code of 1939, quoted in full in Appendix B, pp. 18a and 19a, refer only to "taxable year". The Code definition of taxable year so far as pertinent to the present issues, is as follows:

> " 'taxable year' means the calendar year, or the fiscal year ending during the calendar year, upon the basis of which the net income is computed under this Part * * *."

This lends no support to any division of the "taxable year" of a partnership or partnership income for any calendar or fiscal year.

What difference can or should it make on taxation of partnership income during the year 1944, that services to the partnership were rendered at the end of the year, instead of April and May (see *Crossley* v. *Campbell*, *supra*), or in the year 1942 (see *Isaac Blumberg*, *supra*)?

It is an established principle of law that one cannot take advantage of his own wrong nor can he make performance of an obligation impossible and then take advantage of such nonperformance. The rule is succinctly stated in 12 Am. Jur. 958, as follows:

> "If the impossibility of performance arises directly or even indirectly from the acts of the promissee, it is a sufficient excuse for nonperformance. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned."

This rule was applied against the Government in *United States* v. *Peck*, 102 U.S. 64, where part 2 of the syllabus reads:

> "The conduct of one party to a contract which prevents the other from performing his part is an excuse for nonperformance."

The principle was applied in the *Blumberg* case, *supra*, as is indicated by the quotation from Judge Black's opinion, p. 7, *supra*.

Finally, the petitioner contends that the Court of Claims' conclusions of law and judgment are not supported by that Court's Findings of Fact and in fact are in conflict with the determinative principles of partnership tax law set forth by this Honorable Court in *Commissioner* v. *Culbertson*, 337 U.S. 733.

The opinion in that case by the Chief Justice explains that the "original capital" or "vital services" tests were "an error in emphasis", and then proceeds to set forth the true test of a partnership recognizable for tax purposes as follows: (p. 742)

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—*the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*" (Emphasis added.)

Again on page 744 it is said:

> "Unquestionably a court's determination that the services contributed by a partner are not 'vital' and that he has not participated in 'management and control of the business' or contributed 'original capital', has the effect of placing a heavy burden on the taxpayer to show the bona fide intent of the parties to join together as partners. But such a determination is not conclusive and that is the vice in the 'tests' adopted by the Tax Court. It assumes that there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership. *If, upon a consideration of all the facts, it is found that the partners join together in good faith to conduct the business, having agreed that the services or capital to be contrib-*

> *uted presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient.* (Emphasis added.)

Justice Burton, in his concurring opinion, touches upon the war service question in the following language, p. 749:

> "The physical absence of some of the Culbertson boys from the ranch does not necessarily preclude them or others from the obligations or the benefits of the partnership for tax purposes. The contributions of capital, their participation in the income and their commitments to return to the ranch or otherwise to render service to the partnership are among the material factors to be considered. *A present commitment to render future services to a partnership is in itself a material consideration to be weighed with all other material considerations for the purposes of taxation as well as for other partnership purposes.*" (Emphasis added.)

It is significant in the present case that the Findings of Fact made by the Court below do not include a finding that the petitioner and his son did not act in good faith and with a business purpose to join together in the present conduct of the dental enterprise. It is submitted the mere fact of the son's absence in military service does not compel, or even support, a conclusion of bad faith or lack of business purpose. On the other hand, the Court below did find as facts—

(a) Partnership was promised years before it was formed;

(b) The son had worked in the dental laboratory during his college years when home on vacation;

(c) The partnership was entered into in 1942 to become effective January 1, 1943;

(d) The son's name was placed upon the office door;

(e) The son was authorized to sign checks on the partnership bank accounts;

(f) Partnership books were opened and maintained in the partnership name;

(g) Partnership returns were prepared and filed; and

(h) The son's shares of the partnership income was at his disposal and portions of it were used to pay his obligations.

Surely those Findings of Fact clearly demonstrate good faith and a business purpose to join together presently to engage in the practice of dentistry as partners.

CONCLUSION

For the foregoing reasons and upon the authorities cited, the petitioner submits that the judgment and order of the Court of Claims are in error in failing to recognize the partnership for tax purposes during the entire year 1944.

The petitioner therefore prays that this Honorable Court issue a Writ of Certiorari so that it can review the action of the United States Court of Claims.

Respectfully submitted,

JOSEPH M. CAIN
By ALBERT B. ARBAUGH
1200 Harter Bank Building
Canton 2, Ohio
Attorney for Petitioner

Certificate of Counsel

Albert B. Arbaugh hereby certifies that he is attorney of record for Joseph M. Cain, the petitioner in the foregoing petition for writ of certiorari, that he believes the petition to be well founded in law and in fact and that the petition is not interposed for purposes of delay.

ALBERT B. ARBAUGH
1200 Harter Bank Building
Canton 2, Ohio
Attorney for Petitioner

Canton, Ohio
August 27, 1956

APPENDIX

"APPENDIX A"

IN THE UNITED STATES COURT OF CLAIMS

No. 50418

(Decided November 8, 1955)

JOSEPH M. CAIN v. THE UNITED STATES

Mr. Albert B. Arbaugh for plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for defendant. *Messrs. Andrew D. Sharpe* and *Ellis N. Slack* were on the brief.

Opinion

JONES, *Chief Judge*, delivered the opinion of the court:

This is a suit for refund of additional income taxes which plaintiff claims were improperly assessed for the years 1943 and 1944. The amount claimed as overpayment is $72,979.77.

The plaintiff has been a licensed dentist since the year 1915 and has been practicing in Canton, Ohio. Upon graduation in that year he became a partner of his father, Dr. H. O. Cain. The father, Dr. H. O. Cain, gradually withdrew from the practice of dentistry until 1941 at which time he began devoting his entire time to banking matters. The partnership name, however, Cain & Cain, was continued in use by the plaintiff who from time to time employed other dentists on a salary. He also operated a dental laboratory for the making of artificial dentures.

The plaintiff's son, Dr. Charles C. Cain, was born July 10, 1916. From the time of his birth the plaintiff had anticipated his son's entry into the partnership with plaintiff in the practice of dentistry and held out the prospect of

such a partnership as an inducement to Charles C. Cain to prepare himself well for the profession.

The son was graduated from dental school in June 1942 and was admitted to practice his profession on August 5, 1942. The war was on and while in dental school Dr. Charles C. Cain received a Navy commission as a probationary ensign and was commissioned a lieutenant (jg) in the Navy on October 30, 1942, and was immediately called up for service and left Canton on Navy duty on December 5, 1942. He was absent from canton on Navy duty except for two or three brief leaves until October 26, 1944.

Soon after his admission to practice dentistry in August 1942 Dr. Charles C. Cain became a salaried employee of his father who was then operating under the name of Cain & Cain. His name was placed on the office door at that time.

Some time between September 1, 1942, and January 1, 1943, an undated partnership agreement was signed between plaintiff Joseph M. Cain and his son, Charles C. Cain. Pertinent provisions of this agreement are set out in finding 5. According to its terms the plaintiff, Joseph M. Cain, was to contribute all the capital and equipment in the business that he had been conducting in the city of Canton, together with all the stock and merchandise used in the business, together with his experience and ability, and his son, Charles C. Cain, was to contribute all his knowledge, skill and ability, and both of such parties were to give all their time, experience and ability in the conduct and management of the business.

The contract by its terms was to become effective January 1, 1943. In the meantime, between August 1942, when he entered his father's office and the time he was called into the service on December 5, 1942, Dr. Charles C. Cain had married and the contract provided that in the event of the son's death all the property belonging to the partnership and used in carrying on the business, including the equipment, all stock in trade and all accounts and bank de-

posits, should immediately revert to and become the sole property of the plaintiff, Joseph M. Cain, the senior member of the partnership, including all the profits of the partnership at such time whether divided or not, and that the son's heirs, administrators, executors or assigns should have no interest therein. The contract further provided that in the event of the death of Joseph M. Cain, the senior member of the firm, his interest in the same should be administered according to law.

It was further provided that all monies received by the firm should be deposited in the First Trust and Savings Bank of Canton, Ohio, and each of the partners should have the right to write and execute checks on such account in the conduct and management of the business. The names of all three of the Cains were placed on the printed checks of Cain & Cain prior to January 7, 1943, and the grandfather, father, and son were authorized to sign checks. During the period, however, from August 1942 until early November 1944, no checks were drawn on such bank account by Dr. Charles C. Cain.

From December 5, 1942, to October 30, 1944, Dr. Charles C. Cain took no part in the operation or management of Cain & Cain except for minor services during two or three brief leaves from the Navy.

On October 30, 1944, Dr. Charles C. Cain, having returned from the service, practiced his profession with plaintiff in Canton, exercising all the rights, performing all the duties, and sharing equally in all profits of the business until August 1952 when his younger brother, Joseph H. Cain, became an additional partner.

The original agreement between plaintiff and Dr. Charles C. Cain had been cancelled in 1945 and a new agreement had been entered into providing for a new copartnership between plaintiff and Dr. Charles C. Cain without any restriction on Dr. Charles C. Cain's interest in the income or assets of the firm.

Dr. Joseph M. Cain called in an accountant who set up the usual account books for a partnership beginning January 1, 1943. Such books were maintained under the partnership name of Cain & Cain during all times material to this case. For the years 1943 and 1944 income tax returns were filed showing distributable income of the business in the amounts of $70,346.36 and $89,283.30 for those respective years. These amounts were shown to be distributable one-half to each partner, Joseph M. Cain and Charles C. Cain.

Plaintiff filed these returns and paid the taxes shown due thereon for himself and also caused to be filed a similar return in the name of his son, Dr. Charles C. Cain. He paid the taxes for each by check, charging the check for his son's taxes to the drawing account of Dr. Charles C. Cain.

In May 1947 the Commissioner of Internal Revenue ruled that no bona fide partnership recognizable for income tax purposes existed between Dr. Joseph M. Cain and Dr. Charles C. Cain in the years 1943 and 1944. He levied additional assessments against Dr. Joseph M. Cain, charging him with the entire receipts, together with interest on the deficiency assessment. The details are set out in findings 11, 12, 13, 14, 15, and 16. Credit was given against the additional assessment by the application of the payment that had been made in the name of Charles C. Cain, which had first been placed in a suspension account. The final adjustment was made on April 26, 1948.

On March 13, 1950 plaintiff filed claims for refund for the years 1943 and 1944.

Plaintiff's claim for refund for the year 1944 was rejected on November 17, 1950. At the time of filing the petition the refund claim for the year 1943 had not been acted on.

Plaintiff sues for the refund which he claims is due for each of the two years.

Both parties have cited the decision of the Supreme Court in the case of *Commissioner* v. *Culbertson*, 337 U. S. 733. After a careful reading of the decision in that case we do not believe that plaintiff brings himself within the framework of that decision for the period between January 1, 1943, and October 30, 1944. We quote the following language from pages 739, 740, and 742:

> * * * If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question, * * * it can hardly be contended that they are in any way responsible for the production of income during those years.[6]
>
> * * *
>
> To hold that "Individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it. *Lucas* v. *Earl*, 281 U. S. 111 (1930); *Helvering* v. *Clifford*, 309 U.S. 331 (1940); *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422 (1949).
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> * * * * *

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[6] Of course one who has been a bona fide partner does not lose that status when he is called into military or government service, and the Commissioner has not so contended. On the other hand, one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called. The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case [*Commissioner* v. *Tower*, 327 U. S. 280], but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

> * * * The intent to provide money, goods, labor, or skill sometime in the future cannot meet the demands of §§ 11 and 22 (a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income. * * *

The facts in the instant case are clearly distinguishable in vital respects from the facts in the *Culbertson* case.

The facts in the *Culbertson* case show that for many years prior to 1939 the firm of W. O. Culbertson and R. S. Coon had operated a cattle business. At that time Culbertson was 79 years old and in ill health, and decided to dissolve the partnership. The major portion of the cattle was sold, leaving only about 1,500 head of registered Herefords which Culbertson wished to keep, and for which he offered Coon $65 per head. Coon agreed to sell at that price, but only on condition that Culbertson would sell an undivided one-half interest to his four sons at the same price. His reasons for imposing the condition were his intense interest in maintaining the strain which he and Culbertson had developed, his conviction that Culbertson was too old to carry on the work alone, and his personal interest in the Culbertson boys. The deal was made and two days later Culbertson sold an undivided one-half interest to the four boys and the following day they gave their father a note for $49,720 at 4 percent interest, due one year from date. The note was later increased to cover an additional purchase. It was paid partly by gift from the respondent, but the major portion was paid from the profits from the operation of the ranch.

At the time of the formation of the new partnership Culbertson's oldest son was 24 years old, married and living on the ranch. For the previous two years he had

been foreman under the Coon and Culbertson partnership. He was a college graduate and received $100 per month, plus board and lodging for himself and his wife both before and after the formation of Culbertson and Sons, and until he entered the Army. The second son was 22 years old and finished college in 1940, the first year during which the new partnership operated. He went directly into the Army following his graduation and rendered no services to the partnership before entering the service. The two younger sons, who were 18 and 16 years old, respectively, in 1940, went to school in the winter and worked on the ranch during the summer.

In the instant case the plaintiff's son, Dr. Charles C. Cain, worked for his father's firm on a salary from early August until he was called into the service on December 5, 1942. At the time of signing the agreement some time after September 1, 1942, he and his father had full knowledge that he was to be called into the service; in fact, he had received a commission as probationary ensign while still in dental school prior to the signing of the agreement and was commissioned a lieutenant (jg) in the Navy on October 30, 1942. Both father and son knew that he would be called into the service. The agreement by its terms was to be effective January 1, 1943. Both plaintiff and his son knew that he would not be able to make any contribution to the partnership as such until after his return from the service. The father took pains by the terms of the agreement to provide that should the son die during his period of service all of the equipment, all of the property of the partnership should immediately revert to plaintiff.

We do not believe the facts justify a division of the profits of the firm during the period of the son's service.

We have no doubt that the father had all along planned from the date of Charles' birth for him ultimately to become a member of the firm. We have no doubt that

the young man from the day he reached the years of discretion probably had the same intention.

We find that notwithstanding the effective date recited in the agreement it remained executory until Charles C. Cain returned from the service in October 1944.

There are additional facts that tend to justify this conclusion. Some time during the year 1945 the old agreement was discarded and a new and full time partnership was established without the restrictions which were contained in the old agreement as to the reversion of the son's interest in the firm.

During all the period of the son's service prior to October 30, 1944, he did not write any checks on the firm's account. The father paid the son's income tax as shown on the return which he had prepared. He paid some premiums on the son's insurance. He paid for a trailer to be sent to the son, costing some $700; all of these items were paid by checks written by the plaintiff and charged to the account of the son.

When the younger brother entered the firm of Cain & Cain in 1952 and the partnership books were closed, the plaintiff's investment account was overdrawn on the books of the firm by $31,652.53 and there stood to the credit of Dr. Charles C. Cain the sum of $34,898.14. The plaintiff gave to Charles C. Cain a note in the sum of $66,550.67 which eliminated plaintiff's deficit and entitled him to the balance standing to the credit of Dr. Charles C. Cain. By September 1954, when the proof in this case was closed, the above note had not been paid.

In the light of all the facts and circumstances we find that no real contribution was made by the son, Charles C. Cain, until he returned from the service and took up his work on October 30, 1944; that the full control of the business in reality was retained by the plaintiff, and that

the Commissioner of Internal Revenue properly charged the profits during that period to the plaintiff.

In the light of the new contract that was signed in 1945 without restriction the Collector of Internal Revenue permitted the filing of returns by the individual partners on the basis of a full partnership, effective January 1, 1945.

We find that since Dr. Charles C. Cain returned and became fully active in the firm on October 30, 1944, writing checks, performing professional services, participating in the management, and acting the part of a full-time partner, the plaintiff should have been permitted to file partnership returns for the period from October 30, 1944, to January 1, 1945.

Plaintiff is entitled to judgment for the overpayment for that particular period. The record does not justify a refund for any other part of the period claimed.

Judgment is suspended pending the filing of a stipulation by the parties as to the amount of the refund as calculated on a partnership basis for that period of slightly more than two months. In the absence of such a stipulation the case will be referred to a commissioner of this court for the taking of further evidence limited to the proper refund for that particular period.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and arguments of counsel, and the report of Commissioner Willam E. Day, makes the following findings of fact:

1. The plaintiff, a resident of Canton, Ohio, has been a licensed dentist in that city since 1915. Upon graduation from dental college and subsequent license to practice, he

became a partner of his father, Dr. H. O. Cain. Dr. H. O. Cain gradually withdrew from the practice of dentistry until 1941, at which time he devoted his entire time to banking matters. The partnership name, Cain & Cain, was continued in use by the plaintiff who, during 1943 and 1944, employed other dentists on a salary. He also operated a dental laboratory for the making of artificial dentures, as had the partnership for a long time previously. During all times herein material, Cain & Cain had seven or eight employees.

2. Dr. Charles C. Cain, plaintiff's son, was born July 10, 1916. From the time Charles C. Cain was a boy, plaintiff anticipated his entry into partnership with plaintiff in the practice of dentistry at Canton, and held out the prospect of such a partnership as an inducement to Charles C. Cain to prepare himself well for the profession. During his school years, Charles C. Cain worked occasionally in the laboratory of Cain & Cain when at home on vacations.

3. Dr. Charles C. Cain graduated from dental school in June 1942, and was admitted to practice his profession in Ohio on August 5, 1942. Between his graduation from dental school and his admission to practice, he had gotten married, and after a short wedding trip took his State board examination. While in dental school, he had received a Navy commission as a probationary ensign and was commissioned a lieutenant (jg) in the Navy on October 30, 1942. He was immediately called up for service and left Canton on Navy duty on December 5, 1942. He was thereafter absent from Canton, except for two or three brief leaves of absence, until a few days after October 26, 1944. He was formally released to inactive duty from the Navy on December 4, 1944.

4. Upon his admission to practice dentistry, Dr. Charles C. Cain became a salaried employee of his father who

was then operating under the name, Cain & Cain. His name was placed on the office door at that time.

5. Sometime between September 1, 1942, and January 1, 1943, a partnership agreement was executed between the plaintiff Joseph M. Cain and his son, Charles C. Cain. Such agreement provided in part as follows:

ARTICLE THREE

The said Joseph M. Cain shall contribute all the capital and equipment in the business that he has been conducting in the practice of dentistry in the city of Canton, Ohio, together with all the stock and merchandise used in said business together with his experience and ability, and the said Charles C. Cain shall contribute all his knowledge, skill and ability, and both of said parties are to give all their time and experience and ability in the conduct and management of said business.

ARTICLE FOUR

Said partnership shall continue until such time as the parties mutually agree to terminate it or until the decease of one of the partners.

In the event of the death of Charles C. Cain, one of the partners, all the property belonging to said partnership and used in carrying on the business, including the equipment, all stock in trade and all accounts and bank deposits, shall immediately revert to and become the sole property of Joseph M. Cain, the senior member of said partnership. This provision shall apply to all the profits of the partnership at said time, whether divided or not, and to his share of all profits not withdrawn from said partnership by said Charles C. Cain, and all his interest of every kind in said partnership shall terminate immediately upon his death, and his heirs, administrators, executors or assigns shall have no interest therein.

In the event of the death of Joseph M. Cain, the senior member of said partnership, his interest in the same shall be administered according to law.

* * * * *

ARTICLE SEVEN

All monies received by said partners, or either of them, from said business, or in any way connected therewith, shall be deposited in The First Trust & Savings Bank of Canton, Ohio, and each of said partners shall have the right to write and execute checks on said account in the conduct and management of said business.

ARTICLE EIGHT

Each partner agrees that all gain profits arising from said business shall, from time to time, during the continuation of said partnership, be equally divided between said partners, share and share alike, and all losses and expenses that are incurred in said business shall be paid and born[e] equally between the said partners.

ARTICLE NINE

It is further understood and agreed between the parties hereto, and Dr. Henry O. Cain, that the Partnership pay said Dr. Henry O. Cain One Thousand Dollars ($1,000.00) per year for the right to secure his professional advice and guidance, and that same be deducted from the profits of the partnership before allocation of said profits to the individual partners.

6. Dr. Charles C. Cain's name was added to the names of Dr. Joseph M. Cain and Dr. H. O. Cain on the printed checks of Cain & Cain sometime prior to January 7, 1943. Dr. Charles C. Cain had signed signature cards at the

bank and was accordingly authorized to sign checks from August 3, 1942, along with his father and grandfather. During the period from August 1942 until November 6, 1944, however, no checks were drawn on such bank account by Dr. Charles C. Cain.

7. Dr. Charles C. Cain, being absent from Canton, took no part in the operation or management of Cain & Cain during the period from December 5, 1942, until October 30, 1944, except for minor services during his two or three brief leaves from the Navy. Beginning October 30, 1944, and continuously thereafter, Dr. Charles C. Cain regularly practiced his profession with the plaintiff, taking an active part in the management and control of the affairs of the office such as ordering materials, paying bills by check, performing all the duties of a partner, and sharing equally in the profits until August 1952, when his younger brother, Joseph H. Cain, became an additional partner. The original agreement between plaintiff and Dr. Charles C. Cain had been cancelled in 1945, and a new agreement had been entered into providing for a copartnership of plaintiff and Dr. Charles C. Cain, without restriction on Dr. Charles C. Cain's interests in the income or assets of the firm. The Internal Revenue Bureau recognized Dr. Charles C. Cain as a full partner with the plaintiff from and after January 1, 1945.

8. Dr. Joseph M. Cain called in an accountant who set up the usual account books for a partnership, beginning January 1, 1943. Such books were maintained under the partnership name, Cain & Cain, during all times material herein.

9. On March 15, 1944, and March 15, 1945, information returns of income were filed under the name of Cain & Cain as a copartnership, showing distributable incomes of the business in the amounts of $70,346.36 and $89,283.30 for the calendar years 1943 and 1944, respectively.

The amounts shown distributable to the copartners, plaintiff and Dr. Charles C. Cain, were $35,173.18 to each for 1943 and $44,641.65 to each for 1944.

10. Plaintiff regularly filed his Federal income tax returns for the calendar years 1943 and 1944 and paid the taxes shown due thereon. Plaintiff also caused to be filed similar income tax returns in the name of Dr. Charles C. Cain and paid the taxes shown due thereon with checks chargeable to the drawing account of Dr. Charles C. Cain in the firm of Cain & Cain. The returns reported the distributable income of Cain & Cain as one-half plaintiff's and one-half Dr. Charles C. Cain's.

11. In May 1947, the Commissioner of Internal Revenue ruled that no bona fide partnership, recognizable for income tax purposes, existed between Dr. J. M. Cain and Dr. Charles C. Cain in 1943 and 1944. The Commissioner thereupon added to plaintiff's reported net income for 1943 the amount of $32,673.75 which had been reported as Dr. Charles C. Cain's distributable share of the income of Cain & Cain. The Commissioner added to plaintiff's income for 1944 the amount of $41,141.65, representing the reported share of the income of Dr. Charles C. Cain from the firm of Cain & Cain for that year. As a result thereof, a ninety-day deficiency letter was issued to plaintiff on November 5, 1947, proposing assessment of additional taxes against plaintiff for the years 1943 and 1944 in the amounts of $25,303.20 and $33,696.14, respectively. The Commissioner's determinations of deficiencies were not appealed by plaintiff to the United States Tax Court.

12. On March 11, 1948, the proposed additional assessments were made against the plaintiff, together with interest thereon in the amounts of $5,544.29 for 1943 and $8,436.14 for 1944.

13. Payment of the 1943 deficiency so assessed, with interest thereon, was made by the plaintiff at the following times and in the following manner:

1943		
Oct. 3, 1947	$19,347.46	Cash (see finding 16)
Oct. 26, 1948	57.65	Credit from 1945 overpayment
Nov. 12, 1948	11,442.38	Consent credit from overpayment of Dr. Charles C. Cain for 1943
	30,847.49	

14. There was no evidence adduced with respect to payment by the plaintiff of the 1944 deficiency so assessed with interest thereon. However, the defendant has admitted that payment was made by the plaintiff for that year in the amounts and at the times indicated below:

1944		
Oct. 8, 1948	$5,126.35	Consent credit from overpayment of Dr. Charles C. Cain for 1943
Oct. 8, 1948	3,959.97	Consent credit of interest payable to Dr. Charles C. Cain on his overpayment of 1943 income tax
Mar. 14, 1949	22,690.50	Consent credit from overpayment of Dr. Charles C. Cain for 1944
Mar. 14, 1949	4,064.08	Consent credit of interest on overpayment of Dr. Charles C. Cain for 1944
May 13, 1949	4,146.62	Cash

15. The consent credits from overpayment of Dr. Charles C. Cain referred to in the two preceding findings were made with his written consent. Such overpayments, plus interest thereon, were attributable to the Commissioner's determination that Dr. Charles C. Cain was not a bona fide partner for tax purposes in Cain & Cain for 1943 and 1944.

16. The cash payment of $19,347.46 made by plaintiff on October 3, 1947, was placed by the Collector of Internal Revenue for the 18th District of Ohio in his 9D Suspense Account, in which money paid in by a taxpayer was cus-

tomarily held waiting its application on an assessment to be subsequently made. The contemplated additional assessment was made on March 11, 1948, and plaintiff's payment of October 3, 1947, was transferred from the Collector's 9D Suspense Account and applied against the additional assessment on April 26, 1948.

17. On March 13, 1950, plaintiff filed claims for refund for the years 1943 and 1944, setting forth as the basis of said claims that a bona fide partnership existed between plaintiff and Dr. Charles C. Cain in the years 1943 and 1944 and that the net income of the partnership reported as distributable in those years to Dr. Charles C. Cain was his taxable income and not that of the plaintiff.

18. The Commissioner of Internal Revenue has not formally acted upon plaintiff's claim for refund filed for 1943, but on November 17, 1950, he rejected plaintiff's claim filed for 1944. Plaintiff's petition was filed in this court on November 19, 1951.

19. During 1943 and until October 29, 1944, plaintiff continued the sole management, operation, and control of the business or profession known as Cain & Cain as he had immediately prior thereto. Dr. Charles C. Cain contributed neither capital nor substantial service to the business in those years. His heirs, assignees or administrators could claim no interest whatever in the accumulated or current income or assets of Cain & Cain at that time in case Dr. Charles C. Cain died.

20. During the year 1943 there was withdrawn from the capital account shown as Dr. Charles C. Cain's on the books of Cain & Cain a total amount of $16,155.71, all by checks signed by plaintiff. Of the total withdrawals from Dr. Charles C. Cain's account in 1943, $15,156.28 represented personal income tax payments, the liability for which was attributable to his purported share in the profits of Cain & Cain for that year. The other withdrawals

represented fraternal dues and insurance premiums, except for one check made payable to Western Union for $703.25 cash forwarded to Dr. Charles C. Cain.

21. During the year 1944 there was withdrawn from the capital account shown as Dr. Charles C. Cain's on the books of Cain & Cain a total amount of $19,080.78, all by checks signed by plaintiff. Of the total withdrawals from Dr. Charles C. Cain's account in 1944, $18,006.72 represented personal income-tax payments, the liability for which was attributable to his purported interest in Cain & Cain for that year. The other withdrawals represented fraternal dues and insurance premiums.

22. The information income returns filed for Cain & Cain as a partnership for 1943 and 1944 were prepared and filed under the direction of the plaintiff. The same is true as to returns filed on behalf of Dr. Charles C. Cain. Checks covering income-tax liability of Dr. Charles C. Cain for those years were signed by plaintiff and were drawn on the account of Cain & Cain. Dr. Charles C. Cain signed no checks for any purpose on the Cain & Cain account until November 6, 1944, after his return from Navy service.

23. When the additional partner entered the firm of Cain & Cain in 1952 (see finding 7), when the partnership books were closed the plaintiff's investment account was overdrawn on the books of the firm by $31,652.53, and there stood to the credit of Dr. Charles C. Cain the sum of $34,898.14. The evidence shows that the plaintiff gave to Dr. Charles C. Cain a note in the sum of $66,550.67 which eliminated plaintiff's deficit and entitled him to the balance of $34,898.14 standing to the credit of Dr. Charles C. Cain. By September 1954, when the proof in this case was closed, the above note had not been paid.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

Entry of judgment is suspended pending the filing of a stipulation by the parties, or, in the absence thereof, the filing of a report by a commissioner of the court showing the amount due plaintiff in accordance with this opinion.

"APPENDIX B"

Statutes

Section 182, Internal Revenue Code of 1939—Title 26 USCA 22—53 Statutes 69, as amended by 56 Statutes 845.

> "In computing the net income of each partner, he shall include, whether or not distribution is made to him—
>
> * * *
>
> (c) his distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183 (b)."

Section 187, Internal Revenue Code of 1939—Title 26 USCA 44—53 Statutes 70.

> "Each partner shall make a return of each taxable year, stating specifically the items of its gross income and the deductions allowed by this Chapter, and such other information for the purpose of carrying out the provisions of this Chapter as the Commissioner, with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income, if distributed and the amount of the distributive share of each in-

dividual. The return shall be sworn to by any one of the partners."

Section 188, Internal Revenue Code of 1939—Title 26 USCA 45—53 Statutes 71.

"If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner."

Section 3797, Internal Revenue Code of 1939—Title 26 USCA 507—53 Statutes 469.

"(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) Partnership and partner—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 350

JOSEPH M. CAIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1a-9a) is reported at 135 F. Supp. 516.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1956. The petition for a writ of certiorari was filed on August 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly held that no bona fide partnership recognizable for income tax pur-

poses existed between taxpayer and his son in the years 1943 and 1944 except during the period from October 30, 1944, to January 1, 1945.

STATUTE INVOLVED

The pertinent provisions of Sections 22, 181, 182, 322, and 3797 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

The facts as found by the Court of Claims (Pet. 9a-18a) may be summarized as follows:

Since 1915, the taxpayer has been a licensed dentist practicing in Canton, Ohio. In that year, he became a partner of his father, Dr. H. O. Cain. The latter withdrew in 1941. However, the partnership name, Cain & Cain, was continued in use by the taxpayer who from time to time employed other dentists on a salary. (Pet. 9a-10a.)

Taxpayer's son, Dr. Charles C. Cain (hereinafter called Dr. Charles), was born in 1916, and taxpayer at all times thereafter anticipated Dr. Charles' entry into partnership with taxpayer in the practice of dentistry. (Pet. 10.)

Dr. Charles graduated from dental school in June 1942 and was admitted to practice in August 1942. While still in school, he had received a Navy commission as a probationary ensign. He was commissioned a lieutenant (j.g.) in the Navy on October 30, 1942, and was immediately called up for service. He left Canton on Navy duty on December 5, 1942. He was absent from Canton on Navy duty except for two or three brief leaves until October 26, 1944. (Pet. 10a.)

Soon after his admission to practice dentistry in Au-

gust 1942, Dr. Charles became a salaried employee of his father who was then operating under the name of Cain & Cain. His name was placed on the office door at that time. (Pet. 10a-11a.)

Sometime between September 1, 1942, and January 1, 1943, an undated partnership agreement was signed between taxpayer and his son, Dr. Charles. According to its terms taxpayer was to contribute all the capital and equipment in the business that he had been conducting in Canton, together with all the stock and merchandise of that business; and both parties were to give all their time, experience, and ability in the conduct and management of the business. (Pet. 11a.)

The contract by its terms was to become effective January 1, 1943. In the meantime, between August 1942, when he entered his father's office, and December 5, 1942, when he was called into the service, Dr. Charles had married and the contract provided that in the event of the son's death all the partnership property, including equipment, stock in trade, and all accounts and bank deposits, should immediately revert to and become the sole property of the taxpayer-father, and the son's estate would have no interest therein. And this provision was expressly made applicable to all the profits of the partnership at such time whether divided or not. (Pet. 11a.)

All three of the Cains (grandfather, father and son) were authorized to sign checks on the bank account of Cain & Cain; but, during the period from August 1942 until early November 1944, no checks were drawn on such bank account by Dr. Charles. (Pet. 12a-13a.)

From December 5, 1942, to October 30, 1944, Dr. Charles took no part in the operation or management

of Cain & Cain except for minor services during two or three brief leaves from the Navy. (Pet. 13a.)

On October 30, 1944, Dr. Charles, having returned from the service, practiced his profession with taxpayer in Canton, exercising all the rights, performing all the duties, and sharing equally in all profits of the business until August 1952 when his younger brother, Joseph, became an additional partner. (Pet. 13a.)

The original agreement between taxpayer and Dr. Charles had been cancelled in 1945 and a new agreement had been entered into providing for a new partnership between taxpayer and Dr. Charles without any restriction on Dr. Charles' interest in the income or assets of the firm. (Pet. 13a.)

The usual account books for a partnership were set up for Cain & Cain beginning January 1943, and such books were maintained during all times material herein. For the years 1943 and 1944, information returns of income were filed under the name of Cain & Cain showing income distributable one-half to taxpayer and one-half to Dr. Charles as co-partners. (Pet. 13a-14a.)

Taxpayer regularly filed his income tax returns for 1943 and 1944 and paid the taxes shown due thereon. He also caused to be filed similar income tax returns in the name of Dr. Charles and paid the taxes shown due thereon with checks chargeable to the drawing account of Dr. Charles in Cain & Cain. The returns reported the distributable income of Cain & Cain as being one-half taxpayer's and one-half Dr. Charles'. (Pet. 14a.)

The Commissioner determined that no bona fide partnership recognizable for income tax purposes existed between taxpayer and Dr. Charles in 1943 and 1944. He

taxed all the income to taxpayer and determined deficiences accordingly. (Pet. 14a.)

After payment of the deficiencies (Pet. 15a), taxpayer brought this suit for refund in the Court of Claims. The Court of Claims sustained the Commissioner's determination except for the short period from October 30, 1944, to January 1, 1945, during which it found that a real partnership existed. (Pet. 8a-9a.)

ARGUMENT

The basic question in the Court of Claims was whether there was a valid partnership for income tax purposes in 1943[1] and 1944; and the Court of Claims held there was not, except for the last two months of 1944. Taxpayer has apparently accepted the decision as to 1943 and confines his present contention to 1944, urging (Pet. 2, 5) that absence of a partner on military service is not a proper ground for denying recognition to a partnership or splitting its tax year; and that since the son, Dr. Charles, was serving in the Navy during the first ten months of 1944 and actually rendered services in the last two months of that year, there was consequently a valid partnership for the entire year and no basis for taxing any portion of the son's share of partnership income to the father.

The difficulty with taxpayer's contention is that it assumes that there was a valid partnership prior to the son's entry into service. This assumption is contrary

[1] In the Court of Claims, the Commissioner also contended that taxpayer's claim for refund was not timely filed as to $19,347.46 of the 1943 deficiency. Discussion of this contention appears unnecessary in the present brief. In view of its disposition of the case, holding that there was no valid partnership in 1943, the Court of Claims did not reach the question. And, in his petition for certiorari, taxpayer appears to have abandoned any claim as to 1943.

to the holding of the court below. The Court of Claims was not unmindful of the rule that one who has been a bona fide partner does not lose that status when he is called into military service (*Commissioner* v. *Culbertson*, 337 U. S. 733, 739, n. 6), but it was also aware of the correlated proposition that one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called. (Pet. 5a.) And the Court of Claims, after carefully reviewing the facts, found that there was no real partnership in this case until after the son returned from service in October 1944. (Pet. 7a-9a.) Until that time, as the Court of Claims concluded (Pet. 7a), "Both plaintiff and his son knew that he would not be able to make any contribution to the partnership as such * * *".

In the circumstances, there is no adequate basis for taxpayer's assertion (Pet. 6-8) of conflict with *Blumberg* v. *Commissioner*, 11 T. C. 663 (Acquiescence, 1949-1 Cum. Bull. 1), and *Crossley* v. *Campbell*, 184 F. 2d 639 (C. A. 7th. In each case, prior to the entry of the son into the military service, the partnership had already been actually formed and the son had already rendered substantial services to the business. See *Bellamy* v. *Commissioner*, 14 T. C. 867; *Tindall* v. *Commissioner*, 14 T. C. 1120, 1126 (Acquiescence, 1950-2 Cum. Bull. 4). In the present case, as already pointed out, both taxpayer and his son knew that he would not be able to make any contribution to the partnership as such until after his return from service, and until then the contract was wholly executory. (Pet. 7a-8a.)

Nor is there any conflict, as petitioner alleges (Pet. 10-13), between the decision below and *Commissioner* v. *Culbertson*, 337 U. S. 733. There this Court held

(pp. 744-745) that the validity of a family partnership for tax purposes should be sustained "If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed *presently* by each is of such value to the partnership that the contributor should participate in the distribution of profits * * *" (emphasis added). The Court also said (p. 740):

> * * * The intent to provide money, goods, labor, or skill sometime in the future cannot meet the demands of §§ 11 and 22(a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income.

Here, "upon a consideration of all the facts", the Court of Claims found that no present contribution to the partnership by the son was contemplated by the parties when they executed the partnership agreement and that they knew the son could not make any such contribution until he returned from the Navy. Thus, applying the *Culbertson* test, the court below correctly concluded that prior to October 30, 1944, the purported partnership did not exist in any real sense.[2] In any event, no reason

[2] It follows, as the court below held, that the only 1944 income of the firm that could be divided between father and son for tax purposes is the income allocable to the period beginning October 30. Sections 47(g) and 48(a), Internal Revenue Code of 1939. Petitioner's argument to the contrary (Pet. 9-10)—that the 1944 taxable year cannot be so divided—is based on the erroneous assumption that a genuine partnership was formed in 1942.

appears for review by this Court of this essentially factual issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) [as amended by Sec. 150(g)(1)(A) of the Revenue Act of 1942, c. 619, 56 Stat. 798] As part of his gains and losses from sales or exchanges of

capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1952 ed., Sec. 182.)

SEC. 322. REFUNDS AND CREDITS.

(a) [as amended by Sec. 172(e)(1) of the Revenue Act of 1942, *supra*] *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or

refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) [as amended by Sec. 169(a) of the Revenue Act of 1942, *supra*] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim.

(C) If no claim was filed and the allowance of credit or refund is made within three years from the time the return was filed by the taxpayer, during the three years immediately preceding the allowance of the credit or refund.

(D) If no claim was filed, and (i) no return was filed or (ii) the allowance of the credit or refund is not made within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the allowance of the credit or refund.

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(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(26 U.S.C. 1952 ed., Sec. 3797.)

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